No. 15952

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MOSS AMBER MFG. CO., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*)[1] for enforcement of its order issued on December 12, 1957. The Board's decision and order (R. 27–43) are reported at 119 NLRB No. 104; its decision and direction of election in the prior representation proceeding (R. 6–12) are reported at 116 NLRB 1998. This Court has jurisdiction, as the unfair labor practice (a refusal to bargain with the union certified by the Board) occurred at respondent's plant at San Fern-

[1] The pertinent statutory provisions are reprinted *infra*, pp. 15–16.

ando, California, where respondent manufactures men's sport shirts for shipment in interstate commerce (R. 52).

STATEMENT OF THE CASE

Briefly stated, respondent refused to bargain with the union certified by the Board as bargaining representative of the cutters and spreaders at respondent's San Fernando plant,[2] claiming that the Board acted arbitrarily and abused its discretion in finding that a unit limited to these employees was an appropriate bargaining unit. The facts giving rise to this issue may be summarized as follows:

A. The representation proceeding

On September 5, 1956, the Union filed a petition with the Board seeking certification as the bargaining representative of the cutters employed at respondent's San Fernando plant (R. 3–5).[3] Respondent took the position that the appropriate unit should also include the two cutters employed at its Los Angeles plant, and the bundle girls and patternmaker at San Fernando (R. 7–8, 10–11). Subsequent to the Board decision in the representation proceeding, however, respondent in a motion for reconsideration expressly abandoned its contention with respect to the bundle

[2] Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL–CIO, herein called "the Union."

[3] Although the petition was limited to "cutters", the facts show that the work originally done by cutters alone is now divided into work done by "cutters" and work done by "spreaders" (R. 4, 61–62, 65, 67, 85). All parties apparently agree that the cutters and spreaders are properly included in a single unit.

girls and patternmaker and expressly conceded that a unit confined to spreaders and cutters would be appropriate, although still contending that the Los Angeles cutters should be included in the unit (R. 20). At the hearing the following facts were established:

Respondent is engaged at San Fernando and at Los Angeles in the production of sports shirts (R. 53). The two plants are 25 miles apart, and there has been no interchange of employees between the two plants (R. 73, 24–25). The Los Angeles plant houses the Company's principal office and showroom, and books and payroll records are kept there (R. 53, 59, 79). In addition, the primary designing of the garments is done in the Los Angeles plant, which is also used for the production of samples (R. 54, 57, 77). After the designing is completed, the production of the garments is shifted to San Fernando, where the spreading, cutting, and sewing operations are performed (R. 54, 62–63, 68, 72). The finished goods are then returned to the Los Angeles plant where they are pressed, folded, boxed, and shipped (R. 57, 72, 76). Among the employees at the Los Angeles plant are two cutters in the design department, who cut samples and also cut "trim" (such as collars) which is then shipped to San Fernando to be incorporated in the finished garment (R. 55–56, 61, 78–79). All other cutting and spreading operations are performed at San Fernando (R. 78–79, 25).

The Company president, Henry Amber, is in general charge at Los Angeles, where he does the designing for the Company (R. 55, 57). The Company

vice-president, Edward Moss, is in general charge at San Fernando and spends 50 hours a week there, but testified that he also supervises the cutters at Los Angeles (R. 55, 56). The Los Angeles plant has approximately 25 employees; San Fernando employs approximately 100 (R. 55–59, 69, 74, 76, 65).

On the foregoing facts the Board found that a unit limited to the cutters and spreaders at the San Fernando plant was appropriate (R. 8–11). In excluding the Los Angeles employees the Board stated that it relied particularly on "the geographical separation of the two plants, their different functions, the lack of employee interchange and bargaining history, and the fact that no labor organization currently seeks to represent employees at both plants" (R. 9).

In accordance with the Board's decision, an election was held among the employees in the unit found appropriate, and a majority voted for the Union. The Board accordingly certified the Union as the bargaining representative of these employees. (R. 25–26.)

B. The unfair labor practice proceeding

Respondent, continuing to challenge the appropriateness of the bargaining unit determined by the Board, refused to bargain with the Union upon the later's request (R. 89–91). The Union promptly filed a charge with the Board, a complaint issued, and the case went to hearing before a Trial Examiner (R. 32–33, 86).

At the hearing counsel for the Company sought to introduce evidence that the Board had erred in determining that a unit confined to the San Fernando cutters and spreaders was appropriate (R. 94–95). In

particular, respondent sought to establish that both before and after the filing of the representation petition the Union was seeking to organize the other employees of the Company at both plants (R. 95, 98–100). Respondent also proposed to offer evidence to show that the Board erred in referring to the two plants as performing "different functions" (R. 94, 104–107). Counsel for respondent further stated that "as to the lack of employee interchange, we propose to show evidence as to that" (R. 95, 107). In support of his allegations, counsel for respondent offered in evidence several exhibits intended to show that the Union was actively attempting to organize respondent's employees at both plants, both before and after the hearing in the representation case, and after the issuance of the complaint in the unfair labor practice case (R. 98–100, 103). Respondent's counsel contended that this evidence would establish that the unit found by the Board was "an unrealistic unit based upon the extent of organization" (R. 95). Finally, respondent offered to prove through the testimony of Vice-President Edward Moss (who had been the principal witness in the representation case) that ninety percent of the finished merchandise includes "trim" cut in Los Angeles, that "trim" is often a substantial part of the garment, that the lack of employee interchange in cutters "is merely a happenstance," and that Mr. Gallegos, one of the Los Angeles cutters, "has occasionally done some interchanging" (R. 105–107).

The Trial Examiner declined to permit respondent to introduce the proffered testimony and exhibits, holding that the appropriateness of the unit had been

litigated in the representation proceedings, and that a single trial of the issue was sufficient (R. 103, 107). Accordingly, the Trial Examiner found that respondent's refusal to bargain with the Union certified by the Board violated Section 8 (a) (1) and (5) of the Act (R. 40).

The Board affirmed the rulings and conclusion of the Trial Examiner (R. 27–28). Respondent contended before the Board that some of the evidence it sought to adduce before the Trial Examiner was "newly discovered," and that such evidence, pertaining to alleged efforts by the Union to organize employees in addition to those included in the appropriate unit, would establish that such unit was inappropriate under Section 9 (c) (5) because it was based on the extent of the Union's organization. The Board held, however, that Section 9 (c) (5) precluded the Board only from giving controlling weight to extent of organization, that its unit determination was supported by other evidence wholly unrelated to extent of organization, and that the allegedly newly discovered evidence, even if admitted, would not affect the unit determination (R. 27–28, n. 1).

The Board accordingly ordered respondent to cease and desist from refusing to bargain with the Union, to bargain with the Union upon its request, and to post appropriate notices (R. 28–32).

ARGUMENT

The Board's unit determination was not arbitrary or capricious

Respondent, conceding that it refused to bargain with the Union certified by the Board, attacks the

validity of the certification, claiming that the unit determined by the Board was not appropriate. Under settled law the Board's unit determinations are binding unless they are in excess of the Board's statutory authority or are arbitrary and capricious. *Foreman & Clark, Inc.* v. *N. L. R. B.*, 215 F. 2d 396, 405–406 and cases cited in n. 7 (C. A. 9), certiorari denied, 348 U. S. 887. We show below that the Board's determination that the San Fernando cutters and spreaders constituted an appropriate unit was a reasonable exercise of the Board's statutory discretion and was not arbitrary or capricious.

A. The Board acted reasonably and not arbitrarily in confining the unit to cutters and spreaders

Insofar as the unit was confined to cutters and spreaders and excluded other employees, respondent itself is on record as conceding that such a unit is appropriate. In a motion for reconsideration filed with the Board, respondent, while urging that the Los Angeles cutter and spreader be included in the unit, stated that "The employer * * * agrees that if that is done the unit then so designated will in fact constitute an appropriate unit * * *" (R. 20). The Board in a series of cases has spelled out its reasons for holding that cutters and spreaders enjoy a community of interests different from those of other employees which justifies the inclusion of cutters and spreaders in a separate unit. *Little Champ Manufacturers, Inc.*, 104 NLRB 985, 990; *Rothschild-Kaufman Co.*, 98 NLRB 353; *Sir James, Inc.*, 97 NLRB 1572. These considerations, as well as respondent's express concession, establish that a unit confined to

cutters and spreaders is appropriate. Cf. *May Dept. Stores* v. *N. L. R. B.*, 326 U. S. 376, 379–380; *Mueller Brass Co.* v. *N. L. R. B.*, 180 F. 2d 402, 404–405 (C A. D. C.).

Respondent's "newly discovered evidence" that the Union was seeking to organize other employees in addition to cutters and spreaders does not render the unit inappropriate. The most that can be said for such evidence is that it shows some larger unit might also be appropriate, and that the Union (not the Board) was influenced by the extent of organization in seeking the smaller unit. Both of these contentions are laid to rest by this Court's decision in the *Foreman* case, *supra,* 215 F. 2d at 405–407; see also (as to larger unit) *Mueller Brass, supra,* 180 F. 2d at 405; *Harris Langenberg Hat Co.* v. *N. L. R. B.,* 216 F. 2d 146 (C. A. 8); and (as to "extent of organization") *Harris Langenberg, supra,* 216 F. 2d at 148–149; *Westinghouse Electric Corp.* v. *N. L. R. B.,* 236 F. 2d 939, 943 (C. A. 3); *N. L. R. B.* v. *Morganton Hosiery Co.*, 241 F. 2d 913 (C. A. 4).

B. The Board acted reasonably and not arbitrarily in confining the unit to cutters and spreaders at San Fernando, excluding those employed at Los Angeles

The Board carefully considered respondent's contention that the Los Angeles cutter and spreader should be included in the unit along with the San Fernando employees (R. 8–10). In rejecting this contention in the representation proceeding the Board stated that it relied "upon the entire record" and "particularly * * * the geographical separation of the two plants, their different functions, the lack of

employee interchange and bargaining history, and the fact that no labor organization currently seeks to represent employees at both plants * * * (R. 9).

The fact that the two plants are 25 miles apart is of itself a factor showing that the Board's determination is reasonable and not arbitrary. Indeed, among the units the Board is expressly authorized to find are a "plant unit, or subdivision thereof" (Section 9 (b), *infra,* p. 16). Respondent's contention here is substantially identical to that rejected by the Eighth Circuit in the *Harris Langenberg* case, *supra,* 216 F. 2d at 147–148. There, as here, the employer showed "an interchange of manufacturing operations between plants, but no substantial interchange of workers" and complained that "geographical considerations" alone did not justify limiting the bargaining unit to a single plant. The Court, however, sustained the Board's determination limiting the unit to a single plant. See also *N. L. R. B.* v. *Smith,* 209 F. 2d 905, 907 (C. A. 9); *N. L. R. B.* v. *Norfolk Southern Bus Corp,* 159 F. 2d 516, 519 (C. A. 4), certiorari denied, 330 U. S. 844; *N. L. R. B.* v. *Stanolind Oil Co.,* 208 F. 2d 239, 242 (C. A. 10).

In the above cited cases, to be sure, the Board found a "plant" unit to be appropriate, whereas in the instant case it limited the unit to the cutters and spreaders in the San Fernando plant. Under respondent's reasoning, however, even if the Board had found a plant-wide unit appropriate at San Fernando, the Los Angeles cutters and spreaders would have been wrongfully excluded. Such reasoning, we submit, is

fallacious in that it overlooks the fact that both the statute and the judicial authorities recognize that geographical considerations will justify exclusion from a bargaining unit.

The Board also adverted to the different functions of the two plants in excluding the Los Angeles people from the unit. In general terms, the San Fernando plant is devoted to actual manufacturing operations, and the Los Angeles plant is devoted to operations which precede or follow the manufacturing (R. 53–54, 57–58, 76–79). It is true, as the Company contends, that insofar as the Los Angeles cutters and spreaders cut "trim", which is sent to San Fernando for incorporation in the finished garment, they are engaging in a manufacturing operation. They are, however, also engaged in other activities such as cutting samples and making patterns, and were referred to by the Company vice-president (before the Board decision highlighting the significance of the separate function) as part of the "designing" department (R. 56–57, 61). Respondent has sought to explain their presence in Los Angeles rather than San Fernando as the result of space considerations. We respectfully submit that if these two employees were really an integral part of the San Fernando production operation, and not essential to different functions performed at Los Angeles, respondent would in all probability have found space for them in San Fernando to obviate the necessity of shipping "trim" between the two plants.

The lack of employee interchange between the two plants is a further consideration supporting the Board's determination. See *N. L. R. B.* v. *Smythe,*

212 F. 2d 664, 666 (C. A. 5); *N. L. R. B.* v. *Stanolind Oil & Gas Co.*, 208 F. 2d 239, 242 (C. A. 10); see also *N. L. R. B.* v. *Smith*, 209 F. 2d 905, 907 (C. A. 9.). Finally, the lack of bargaining history and the fact that no labor organization currently sought to represent the Los Angeles cutter and spreader were likewise appropriate for the Board to consider in excluding them from the unit. Cf. *May* case, *supra*, 326 U. S. at 379, 380.

Respondent contends that evidence which it sought to introduce in the unfair labor practice case (*supra*, pp. 4–5) would have established that the Board erred in its determination to exclude the Los Angeles employees. We turn, therefore, to a consideration of this proffered evidence to show, first, that it was properly excluded, and second, that its introduction would not have affected the result in this case.

C. The Board's procedure was valid and proper and did not prejudice respondent

The law is well settled that if an issue, such as the appropriateness of a unit, is litigated in a representation proceeding, the Board need not permit it to be relitigated in the unfair labor practice proceeding; "a single trial of the issue was enough." *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 162; see also *N. L. R. B.* v. *American Steel Buck Corp.*, 227 F. 2d 927, 929 (C. A. 2); *N. L. R. B.* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C. A. 1), certiorari denied, 336 U. S. 903. Respondent contends, however, that the evidence it sought to introduce was not cumulative, but was newly discovered and ma-

terial to the issues and therefore not covered by the general rule quoted above.

Insofar as respondent's proffered evidence went to the functions and operations of the two plants, it was manifestly not "newly discovered." Thus, the evidence as to the number of finished garments which carried "trim" cut in Los Angeles was readily available at the time of the representation case, and was cumulative to evidence already in the record, and to the supplementary affidavit already filed by the same witness respondent sought to examine in the unfair labor practice case (R. 78–79, 22). Respondent also sought to introduce evidence that the lack of interchange of employees "is merely a happenstance" and that one of the employees "has occasionally done some interchanging" (R. 107). That the lack of interchange was "happenstance" would not alter the fact, relied on by the Board, that interchange had not occurred. The one employee, Gallegos, who is now alleged to have "interchanged," was specifically identified in the earlier proceeding as an employee who had never worked at San Fernando (R. 62, 107). An employer, once the Board has indicated reliance on such a factor in reaching a unit determination, should not be able by an occasional transfer of an employee, to upset a certification already issued and require relitigation of a representation proceeding. Moreover, the mere occasional interchange of employees would not affect the Board's reliance on the actual absence of free interchange of employees, as the cases cited on this point, pp. 10–11, *supra,* establish.

The only "newly discovered," non-cumulative evidence which respondent sought to introduce goes to the Union's efforts to organize other employees. The Board expressly passed on the effect of this evidence (R. 27–28, n. 1), thereby curing any error in excluding it. As we have previously observed (p. 8), the Union's efforts to organize other employees in no way affect the validity of the unit determination or suggest that the Board's determination was controlled by "extent of organization." The fact that the Union sought to organize the cutters and spreaders at Los Angeles is no more relevant than the fact that the Union sought to organize other employees at San Fernando. Indeed, assuming that the Union succeeded in these efforts, there is no reason to suppose that either the Union or the Board would expand the bargaining unit; the newly organized employees might well be in a different bargaining unit. Respondent would apparently have it that, once a union was chosen to represent a part of a plant, the union must cease all efforts to organize other employees, on pain of losing its certification. Nothing in the statute suggests that any such restriction should be imposed. Insofar as respondent seeks to show that the Union sought to organize the Los Angeles cutter and spreader *before* the certification issued, this fact was put before the Board in the prior proceeding (R. 24). The Board's statement that "no labor organization currently seeks to represent employees at both plants" (R. 9) refers to the fact that no union had filed a petition with the Board claiming to represent employees at both plants; the Board is not concerned,

and is certainly not "controlled" by organizing efforts which have not reached the stage of a formal representation claim.

CONCLUSION

In sum, we believe that this case is largely controlled by this Court's decision in the *Foreman* case, *supra,* 215 F. 2d at 405–408, sections 4–7 of the opinion. For the reasons there stated, as well as for those set forth in this brief, we respectfully submit that a decree should be entered enforcing the order of the Board.

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OCTOBER 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit

appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

(c) (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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